84-78

No. _____

In The

Supreme Court of the United States

October Term, 1983

ROBERT L. CAMPBELL, et al.,

Petitioners,

vs.

DEPARTMENT OF TRANSPORTATION;
FEDERAL AVIATION ADMINISTRATION,

Respondents.

ON WRIT OF CERTIORARI TO THE FEDERAL CIRCUIT COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL COURT

Appeal No. 83-1173

ROBERT L. CAMPBELL, ET AL.,*

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

DECIDED: May 18, 1984

Before MARKEY *Chief Judge,* FRIEDMAN, RICH, SMITH, and NIES, *Circuit Judges.*

NIES, *Circuit Judge.*

This appeal is from a decision of the Merit System Protection Board (board) sustaining the removal of Robert L. Campbell and others by the Federal Aviation Administration (agency) from their positions as air traffic control specialists, Denver Air Route Traffic Control Center (DARCC), Longmont, Colorado. The grounds for removal were striking against the United States and absence without leave. We affirm.

Background

The general facts concerning the background of the strike called by the Professional Air Traffic Controllers Organization (PATCO) and the action taken by President

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* The names of the petitioners in this appeal are listed in the appendix.

Reagan are set forth in *Schapansky v. Department of Transportation, FAA,* No. 83-663 (Fed. Cir. May 18, 1984), and are incorporated herein by reference. Other facts pertinent to the issues considered herein are set out below.

None of the petitioners of this appeal, except Russell S. Root, reported for duty after August 3, 1981. Between August 7 and 19, the Chief of the Denver Air Traffic Control Center, Ralph Kiss, sent a notice of proposed removal to each petitioner after determining that the person had missed his/her deadline shift.

The removal notices each contained the following statement: "[Y]ou may reply to this notice personally, in writing, or both . . . within 7 calendar days after you receive this letter." None of the petitioners made a reply affirming or denying the charges within the seven day period. Each, however, by letter, requested certain materials be sent; requested an extension of time within which to file a reply; and designated Michael Curtis of PATCO, Local 501, as his/her representative.

Kiss responded promptly in writing to each, denying the request for an extension and advising that "your response, if any, must be made in accordance with the letter of proposed removal."

On August 17, Kiss contacted Curtis, the designated representative, and notified him that oral responses could be scheduled by having individual controllers call the Center. No oral reply time was requested by any petitioner or Curtis after that call.

Petitioners were subsequently removed from their positions by the agency. Petitioners appealed to the Denver

Regional Office of the MSPB, where their cases were consolidated. After a 5-day hearing, the presiding official issued a decision sustaining the removals.[1] Petitioners filed a joint petition for review with the full board, alleging numerous errors committed by the agency and the presiding official. The board rejected petitioners' arguments and affirmed the decision of the presiding official.

Issues

Petitioners here put forth positions which are addressed and rejected in other related cases decided today, including:

1. The agency committed error in invoking the crime provision to reduce the notice period to seven days. *See Schapansky,* slip op. at 19-20.
2. Petitioners were denied a full seven days to respond to the notice of proposed removal. *See Adams v. Department of Transportation, FAA,* No. 83-1155, slip op. at n.3 (Fed. Cir. May 18, 1984).
3. The MSPB improperly shifted the burden of proof to petitioners to prove that they were non-strikers. *See Schapansky,* slip op. at 9-11.
4. Petitioners were not on strike or AWOL after the presidential deadline of 11:00 a.m. (E.D.T.)

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[1] All petitioners were also held to be AWOL. With respect to petitioner Root, the presiding official found that, because he had notified the agency that he was ready, willing, and able to return to work on August 8, his non-duty, non-pay status after that date constituted an improper suspension. Accordingly, the presiding official ordered the agency to amend its records and to place Root in a duty and pay status from August 8 until September 2, the effective date of his removal. The full board agreed that Root had been illegally suspended during this period.

on August 5, 1981, because confusion over the deadline shift rule caused belief that they could not return to work. *See Adams,* slip op. at 4-7.

5. Petitioners received disparate treatment as compared to controllers who returned to work prior to their deadline shift. *See Schapansky,* slip op. at 17.

6. The agency deprived petitioners of the opportunity to decide, up to the last minute, whether they would return to work by failing to inform petitioners of their individual deadlines. *See Adams,* slip op. at 6-7.

7. Petitioners' terminations were tainted by command influence, in that terminations were controlled by decisions of high Government officials, including the President, who usurped responsibilities specifically delegated to the agency. *See Schapansky,* slip op. at 20-23; *DiMasso v. Department of Transportation, FAA,* No. 83-1158, slip op. at 6 (Fed. Cir. May 18, 1984).

8. Petitioners were illegally constructively suspended. *See Adams,* slip op. at 9-11.

9. Removal is not the mandatory minimum penalty for striking against the United States. *See Schapansky,* slip op. at 18-19.

Petitioners also raise the following issues which we address in this opinion:

1. Whether the agency committed error in not scheduling times for oral replies.

2. Whether the MSPB decision was tainted by improper *ex parte* communications and advisory opinions.

In addition, several petitioners raise issues based on the special circumstances of their individual situations, which we also treat below.

Scheduling of Oral Reply Times

Petitioners assert procedural error by the agency in failing to schedule oral reply times. Petitioners contended that it was incumbent on the agency to set a reply time for each petitioner in view of their requests that a specific time be set. As proof of such specific requests, petitioners point to a standard request included in the requests for extension of time: "Please inform me specifically of the time and place such a personal presentation may be made and the date on which my written response is due."

Petitioners argue that since the agency had the names and addresses of all controllers, "it would have been a simple matter to send each of [the striking controllers] a letter scheduling a time for an oral response." Petitioners claim that the telephone call on August 17 from Kiss to Curtis indicating that it was each controller's responsibility to schedule oral presentations "was merely an attempt to correct the previous error that had already taken place, to-wit: the failure to schedule oral response as requested."

As the MSPB held, while the statute and regulations clear provide for a right to make an oral response to agency charges, they do not require the agency to schedule replies *sua sponte*. Rather, it is incumbent on an employee to take the initiative in scheduling the time to exercise that right.

Further, the above-quoted request for scheduling reply times, on which petitioners rely as an assertion of such right, is taken out of context. The opportunity for oral reply actually requested by the letter was *no earlier*

than "20 days from the receipt of [requested] materials." An even later time was requested for written reply. *No request* was made for the agency to receive a petitioner's oral reply within the required seven day period set forth in the notice. Further, as held in *Dorrance v. Department of Transportation, FAA,* No. 83-1175, slip op. at 6-7 (Fed. Cir. May 18, 1984), there was no obligation on the agency to extend the time for reply under the circumstances.

It appears that petitioners turned the scheduling of oral replies into a "cat-and-mouse" game, defeating the purposes intended by the statute in granting such right. The evidence of record indicates that attempts by Kiss to contact petitioners directly by telephone were fruitless. He was unable to reach petitioners' representative, Curtis, at his office and pursued him at home to raise the matter of oral replies. One person to whom he spoke directly refused to make an oral reply "on advice of counsel." We see no bad faith on the part of the agency in these efforts. On the other hand, Curtis had ample opportunity to request reply times within the seven day period and chose not to do so.

Finally, petitioners appear to raise a futility issue with regard to requesting oral reply times, arguing that "it would have been impossible for the agency to accomplish oral responses for all controllers within the time frame prescribed by Mr. Kiss." Kiss, on the other hand, testified that all oral replies would have been heard. We need not consider this hypothetical situation. The fact is that no requests for oral reply times within the seven day period were made.

For the above reasons, we therefore agree with the board that petitioners have failed to demonstrate any

procedural error in the agency's handling of the oral response requests.

The Ex Parte Communications and Advisory Opinions by the MSPB

Petitioners allege the occurrence of improper *ex parte* communications between Special Presiding Official Kenneth Goshorn and agency representative Diane R. [illegible] on February 23-24, 1984. Petitioners' representative notified the board of the communications by letter dated March 7, 1983. After a thorough investigation, the board's Ethics Officer determined that the conversations were procedural in nature, did not relate to the merits of a board appeal, and, therefore, did not constitute a prohibited *ex parte* communication under 5 C.F.R. § 1201.102. The full board concurred in that determination.

Petitioners, in their reply brief, admit that the *ex parte* communications in issue are themselves insufficient to warrant reversal of the board's decision. Rather, they request that the incident be considered along with "other due process violations" that occurred.

The "other due process violations" petitioners delineated are the promulgation of "advisory opinions" by the General Counsel's office of the MSPB. In response to an FOIA request, petitioners obtained copies of legal memoranda which were sent by the board's General Counsel to the board's then Acting Assistant Managing Director for Regional Operations and which were transmitted to regional directors under cover of a memorandum which identified the enclosures as "Advisory Opinions from Office of General Counsel."

Petitioners' contention is that the "creation, circulation and incorporation" of advisory opinions violates 5 U.S.C. § 1205(g).[2] According to petitioners, "[F]or the Board to pre-determine the resolution of a number of legal issues violates [their] right to meaningful review."

In the subject memoranda the General Counsel addressed the issues of:

1. Challenges to the constitutionality of 5 U.S.C. §§ 3333 and 7311(3) and the board's power to pass on constitutional questions.
2. Whether first amendment rights of controllers were violated.
3. Whether disputes over pay, safety, and working conditions justified the strike.
4. Whether violation of 5 U.S.C. § 7311(3) requires removal.
5. Whether presiding officials can take "official notice" of the strike.

The memoranda contain analyses of the pertinent case law and legal commentary and, in some instances, state the author's conclusions. The transmittal memorandum from the Assistant Managing Director advised presiding officials that they were "not obligated" to follow the analysis, stating: "Indeed, presiding officials are responsible for conducting their own research of the issues. . . ."

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[2] 5 U.S.C. § 1205(g) reads:

(g) The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. *The Board shall not issue advisory opinions.* All regulations of the Board shall be published in the Federal Register. [Emphasis added.]

We agree with respondent that 5 U.S.C. § 1205(g) does not prohibit the General Counsel from issuing legal memoranda reflecting research into common issues in these proceedings.[3] Indeed, under 5 C.F.R. § 1200.10(c), the primary function of the Office of General Counsel is to provide "legal advice to the Board and its staff," which necessarily includes the Office of the Managing Director and the field offices. That some presiding officials adopted part of the language from the memoranda does not indicate an abdication of their responsibilities or dictation of result by the General Counsel's Office.

In any event, the thrust of 5 U.S.C. § 1205(g) appears to be to prohibit the board from *issuing* advisory opinions to the public, a prohibition comparable to the prohibition against federal courts issuing advisory opinions, and in contrast to other agencies which are authorized to issue advisory opinions as a guide to future conduct. A violation by action of this nature is not asserted by petitioners.

For these reasons, therefore, we affirm the decision of the board that these procedural issues are meritless.

Individual Fact Situations

Russell S. Root

Root was originally scheduled for annual leave from August 1 through August 6, had regular days off on August 7 and 8, and was, therefore, due to return to work on August 9. Before the presiding official, the agency

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[3] In a motion for remand, petitioners appear to concede that the General Counsel's memoranda were not *per se* unlawful but sought remand to determine if some presiding officials were unduly influenced.

introduced a telephone memorandum, as well as the testimony of Kiss, indicating that on August 2, 1981, Root's supervisor, Gutenberg, had called Root's home and informed Root's wife that Root's leave had been cancelled, and that Mrs. Root had agreed to forward the message to her husband.

In a subsequent conversation on August 4, Kiss spoke directly with Root and requested that he return to work but Root said he could not do that. Cancellation of annual leave was admittedly not discussed during this conversation.

On August 8, 1981, petitioner Root called Kiss and requested to return to work on August 9.[4] Kiss refused this request, indicating to Root that he had missed his agency deadline for returning to duty on August 6.

Root asserts that the agency has failed to present any evidence indicating that he actually received word from his wife that his annual leave had been cancelled; moreover, he "does not concede" that the phone call to his wife was even made.[5] He discounts all evidence presented on this issue as hearsay.

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[4] As mentioned in n.1, since Root indicated a willingness to return to work, the board found his suspension to be unlawful, and ordered that he be placed in a duty and pay status from August 8 until his removal on September 2.

[5] Root also argues that his leave was not properly cancelled. The propriety of the agency's cancellation of annual leave is affirmed in *Letenyei v. Department of Transportation, FAA*, No. *83-1174* (Fed. Cir. May 18, 1984). Unlike Letenyei, Root offered no testimony that he was not a striker, so that remand is not appropriate.

The board considered Root's argument but found it unpersuasive. Root never denied receiving the message from his wife. We believe the board was correct in drawing an adverse inference from Root's failure to testify and contest the evidence presented by the agency. *See Adams*, slip op. at 7-9

With regard to Root's hearsay argument, we note that it does not appear that counsel for Root objected to the introduction of the evidence at issue. But, in any event, hearsay evidence is admissible and may be sufficient in board proceedings. *Richardson v. Perales*, 402 U.S. 389 (1971); *Peters v. United States*, 408 F.2d 791 (Ct.Cl. 1969). *See also, Dorrance*, slip op. at 4-5.

David Gold

Petitioner Gold seeks reversal of his removal on the basis of a defective notice of proposed removal. The notice of proposed removal sent by Kiss to Gold on August 18 indicated that he was being charged with striking and with being AWOL beginning at 3:15 p.m. on August 13. At the hearing, Kiss admitted that he had learned subsequently that Gold's Time and Attendance Record, on which he based the notice, was in error and that Gold had, in fact, been on pre-approved spot leave through August 16. The board noted that Gold did not dispute that August 17 was his deadline, and upheld his removal solely on the basis of his failure to report on that date.

Gold claims that because of the "defective" notice of proposed removal, he was given no advance notice of the "real" reason for his termination. Gold points to 5 U.S.C. § 7513(b)(1) which requires an agency to state,

in a notice of removal, "the specific reasons for the proposed action."

Contrary to Gold's view, a notice of proposed removal or removal notice which contains charges which are not sustained is not "defective." An adverse action may be sustained even though not all charges on which the action is stated to be based are sustained. *See, e.g., Pascal v. United States,* 543 F.2d 1284, 1289 (Ct.Cl. 1976). The question here is whether the notice adequately apprised Gold that he would have to defend the charge of striking on August 17, the ground on which the action was sustained. Viewed this way, there is no question but that he was advised that his removal was proposed for participation in a strike against the United States during a period which specifically included August 17. Gold was, thus, well aware that he would be required to explain his absence from the facility on that date and raises here no valid defense to that charge.[6] Proof of one day of striking was entirely sufficient to warrant removal.

We hold that the agency notice supplied sufficient information upon which Mr. Gold could make an "informed reply."

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[6] Before the MSPB, Gold asserted that the strike ended on August 5. However, based on the evidence, the MSPB held that the strike continued at least through August 17, 1981 at the DARCC. Substantial evidence supports that finding. The elimination of some dates did affect the days for which Gold could be charged as being AWOL and receive no pay. No complaint is raised here that he did not receive the amounts due as a result of the correction in his record.

Thaddeus W. Wallace

Petitioner Wallace was on approved annual leave and days off from August 1 through August 12. The agency attempted, but was unable, to contact Wallace to cancel his annual leave. Kiss testified at the hearing that, on August 10, Wallace telephoned his supervisor, Hodges, and stated that he was aware of the strike and would return to work on August 11. Wallace failed to report for work on the 11th or on the 13th, his next scheduled shift after the expiration of his authorized leave. He was charged with strike participation and absence without leave from August 13 through August 19. The MSPB upheld the removal on the basis of his absence on August 13.

As we stated previously with respect to Gold, substantial evidence supports the board's finding that the strike lasted at least through August 17, and Wallace's absence on August 13 is unexplained. We therefore affirm the board's finding that the agency established a *prima facie* case of strike participation by Wallace on August 13.

Wallace's specific argument appears to be that Kiss's testimony could not establish his actual awareness of the strike on August 11. There is no indication that the board relied on this testimony and no explanation by petitioner how exclusion of the testimony would have affected his case.

Conclusion

For the reasons state herein and in the related cases decided today, the decision of the Merit Systems Protection Board affirming the removal of petitioners is *affirmed.*

AFFIRMED

Appendix

ISIAH BAILEY
PETER J. BAKER
RICK W. BAWEK
BARBARA I. BICKFORD
WILLIAM R. COLLIER
DENNIS L. DOWSE
RICHARD B. DUNCAN
STEPHEN G. FINCHER
DAVID GOLD
GILBERT R. GULICK
DAVID C. HARRISON
JOHN F. HAYES, JR.
TIMOTHY F. HIPSHER
FREDERICK L. HOOD
JAMES R. HUME
ROBERT K. KEBARTAS
TERRY T. KELLING
KEITH T. KEMPTER
LESLIE H. KLAHN, JR.
ROBERT E. KOVACH
LAWRENCE J. KRAUSS
JOSEPH J. KREUZER
BRADLEY P. LIGHT
BRUCE C. MEACHUM
DANNY M. MITCHELL
RODNEY P. MICHAELS
TERESA M. MICHAELS
BARTHOLOMEW H. MUNOZ
MICHAEL M. MURPHY
MICHAEL A. NORD
ROBERTS M. O'GRADY
DARRELL G. OTTERSBERG
EDWARD E. PHILLIPS
ROGER E. PRICE
THOMAS A. PUTNEY
SHANNON K. REDDING
RUSSELL S. ROOT
ALFRED SAENZ
JAMES L. SCHILTHUIS
DAVID W. SHALLCROSS
JERRY W. SOUKUP
JAMES T. SPINUZZI
DARRELL L. TAYLOR
PAULA J. VAN DUSEN
ROBERT L. VAN DYKE
PAUL D. VAUGHAN
MICHAEL J. VIOLETTE
THADDEUS W. WALLACE
RICHARD D. WALLER
ROBERT E. WARD
THOMAS G. WEIMER
DEBRA J. WILLIAMS

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

May 18, 1984

ERRATUM

Appeal No. 83-663

Roy L. Schapansky v. Department of Transportation, FAA, Decided:

Please make the following changes:

Page 13, first full paragraph, line 1, insert after *"Transportation"*—*FAA,*—.

Page 15, line 5, delete "No. 83-859, slip op. at 11 (Fed. Cir. Dec. 30, 1983)" and insert after *"Development,"*—724 F.2d 943, 949 (Fed. Cir. 1983).—.

Page 17, first full paragraph, line 6, insert a comma after *"Jones"* and delete "v. *U. S.,*".

Page 18, line 7, correct *"Don"* to read—*Dow*—.
line 10, change *"Patco"* to—*PATCO*—and insert comma after "(7th Cir.)".

Page 20, first full paragraph, line 8, delete *"United States"*.

Page 22, first full paragraph, line 3, delete *"In Re:"*.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-663

ROY L. SCHAPANSKY,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

DECIDED: May 18, 1984

Before MARKEY, *Chief Judge,* FRIEDMAN, RICH, SMITH and NIES, *Circuit Judges.*

MARKEY, *Chief Judge.*

Appeal from a decision of the Merit Systems Protection Board (Board), Docket Number DA075281F1130, sustaining the August 26, 1981, permanent removal of Roy L. Schapansky (Schapansky), by the Department of Transportation's Federal Aviation Administration (agency) from his position as Air Traffic Control Specialist at the Air Route Traffic Control Center in Fort Worth, Texas. We *affirm.*

BACKGROUND

Removal was based on charges of participation in a strike against the United States from August 3 to August 5, 1981, absence without leave for the same period, and

violation of the "loyalty and striking" provision of 5 U.S.C. § 7311.[1] Schapansky appealed to the Board's Dallas Regional Office, which sustained the removal on May 14, 1982. On timely petition for review, the full Board affirmed the presiding official's decision and sustained Schapansky's removal on October 28, 1982.

Presiding Official

The presiding official determined that the agency had established by a preponderance of the evidence: (1) that Schapansky was a member of the union, the Professional Air Traffic Controllers Organization (PATCO); (2) that he was aware of the strike by the members of PATCO; (3) that he intended to and did participate in that strike by refusing, in concert with others, to provide his services to his employer; (4) that the agency did not

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[1] "§ 7311. Loyalty and striking

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he nows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he now asserts the right to strike against the Government of the United States or the government of the District of Columbia."

err in applying the statutory provision of 5 U.S.C. § 7513 (b) (1);[2] (5) that the agency was correct under § 7513(b) (1) in disregarding the requirement for 30 day notice before deciding upon and effecting an adverse action because it had "reasonable cause to believe the employee ha[d] committed a crime" and because 18 U.S.C. § 1918[3]

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[2] Section 5 U.S.C. § 7513 provides, in pertinent part:

"§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date."

[3] "§ 1918. Disloyalty and asserting the right to strike against the Government.

Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(Continued on next page)

makes striking by federal employees a crime; (6) that once an agency invokes § 7311, removal of the employee is mandatory; and (7) that removal was required to promote efficiency of the service under § 7513(a).

Board

Before the Board, Schapansky reiterated his basic contention that no evidence supported a finding that he had participated in the strike. He conceded that he was absent without leave on August 3, 4, and 5, 1981, and that his absence was a protest against the same conditions that other PATCO members were protesting by withholding their services. Schapansky said other PATCO members were "thinking different", but he viewed his absence as a legal protest and PATCO's "lawyers would take care of it." The presiding official, in finding that Schapansky was aware of and intended to participate in the strike, cited Schapansky's own testimony that he voted "yes" when a "strike vote" was taken by PATCO members on August

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(Continued from previous page)

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he nows asserts the right to strike against the Government of the United States or the government of the District of Columbia;

shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both."

2, 1981, and that the agency had informed him that the strike would be in violation of law. The Board found no basis on which to disagree with the presiding official's finding or assessment of the hearing testimony.

The Board noted that Schapansky in his petition for review neither challenged the presiding official's discrediting of his assertion that he was absent because of harassment and fear for his personal safety, nor asserted any other basis on which his absence might be determined to have been involuntary.

Schapansky challenged the agency's consideration of a photograph showing him among PATCO picketers, saying he is not shown as carrying a sign and that nothing showed him among picketers on August 3 or 4. The Board said that voluntary withholding of services in concert with others, not physical presence on a picket line, constitutes the gravamen of the charge. Schapansky's challenge of the photograph was therefore found unavailing.

On the merits of the basic charges, the Board held that the agency had proved the charges, that Schapansky had not rebutted the evidence of his knowledge of the strike and of his intent to withhold his services along with other PATCO members, and that he had made no showing that his absence was due to any factor other than strike participation.

Objecting to the absence of a 30-day advance written notice, Schapansky argued that he had not been formally charged with or convicted of a crime and that the agency had not proved his intent to do anything illegal. The Board pointed out that it has not adopted criminal charges, convictions, or proof of illegal intent as prerequisites to

a finding of "reasonable cause to believe" that a crime had been committed in support of a decision to disregard the notice provision. The Board went on to say that because § 1918 makes participation in a strike against the United States a felony punishable by up to one year and a day of imprisonment, and because Schapansky's conduct evidenced such participation, it would sustain the finding that the agency had reasonable cause to believe that a crime had been committed and that disregard of the notice requirement was thus permissible under § 7513(b)(1).

Reading § 7311(3) as mandating removal when a charge of striking is sustained, the Board rejected Schapansky's contention that removal was unreasonable. The Board further noted the self-evident gravity of Schapansky's offense in participating in a strike against the Government, that by its very nature such action disrupts the Government's performance of its mission, that it is a criminal offense, that the position of air traffic controller is highly sensitive, the incumbent being directly responsible for the safety of passengers, and that that responsibility entails maintenance of the confidence of his employer and the public who rely on him. The Board viewed a controller's intentional and ongoing abdication of that responsibility, by participating in the strike and by continuing to strike despite the President's 48-hour grace period,[4] as constituting particularly egregious conduct

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[4] At approximately 11:00 a.m. E.D.T. on August 3, 1981, the President of the United States announced:

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which destroyed the controller's unique relationship of trust. The Board therefore held that the agency's removal penalty cannot be deemed excessive, disproportionate, or unreasonable.

Sustaining the finding that removal will promote the efficiency of the service, § 7513(a), the Board determined that § 7311 reflects the belief of Congress that removal of an employee for participation in a strike promotes that efficiency, and that there is a clear and direct relationship of such misconduct to the employee's satisfactory accomplishment of his duties and to the agency's ability to fulfill its mission.

Issues[5]

(1) Whether the Board correctly determined that the agency proved the charges by a preponderance of the evidence.

(2) Whether the penalty of removal was too harsh and unreasonable and should be mitigated.

(3) Whether the removal here was effected with harmful procedural error.

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> This morning at 7:00 a.m. the union representing those who man America's air traffic facilities called a strike.—I must tell those who failed to report for duty this morning they are in violation of the law and if they do not report for work within 48 hours, they have forfeited their jobs and will be terminated.

While more than 1,200 controllers heeded the President's call to return to work; approximately 11,500 continued to strike. 17 Weekly Comp. of Pres. Doc. 845 (August 3, 1981).

[5] Because this and nine other "lead" cases involving air controllers were argued before the same panel on the same day,

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OPINION

(1) *The Charges*

In discussing the issues, the briefs of Schapansky and *amici* cite the language of court opinions dealing with matters and questions totally divorced from those in a case dealing with the propriety of the government's action in removing those who strike against it. We join enthusiastically in the general desire for symmetry in law and procedure, and nothing here said is thought to make a fundamental difference in either (except perhaps for recognition that mitigation is irrelevant when striking is proved, *infra*). Nonetheless, the facts of this case, and the differences between them and those in other types of cases, are such as to render without purpose a discussion here of the many other types of cases cited in the briefs.

The Board properly held that though the agency could establish a *prima facie* case of striking by showing an employee's unauthorized absence during a strike of

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counsel were permitted to present issues which may not have been presented to the Board in the particular case argued by counsel, but which had been presented to the Board in one or more of the lead cases.

Similarly, the court has taken judicial notice, at Schapansky's request, of the materials in his Supplemental Appendix, the Board having considered major segments of that appendix in another lead case.

Briefs *amicus curiae* were received from three sets of counsel collectively representing many hundreds of air controllers whose cases are described by *amici* as likely to be controlled by the outcome in this case. Issues and arguments presented by *amici* in this case are addressed here.

general knowledge and his presence on the picket line, the latter element is not essential, and the charge of striking is proven when it is shown that the employee withheld his services in concert with others, regardless of whether the employee joined a picket line. *See United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879, 884 (D.D.C.), *affirmed*, 404 U.S. 802 (1972). The Board did not, as *amici* assert, accept mere absence during a strike as proof of the charges. On the contrary, as appears below, it took into account all of the facts and circumstances. The Board's decision was not even remotely "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law . . . " 5 U.S.C. § 7703(c).

The record demonstrates unequivocally that the strike was well and widely known, that Schapansky knew it was illegal to strike against the government, that he knew FAA considered PATCO's "job action" an illegal strike, that his absence was unexplained, that he never attempted to contact the agency to advise it of any reason for his absence, and that under the circumstances his absence constituted evidence of participation in the strike. Proof of a wide-spread strike of general knowledge, together with proof of Schapansky's absence without authorization or explanation during the strike, must in the practical world constitute at least a *prima facie* case of his participation in the strike.

Once an agency has made a *prima facie* showing, the burden of going forward with evidence to rebut that showing necessarily shifts to the employee, who is in the best position to present explanatory evidence to counter that showing. The burden of proving the charge by preponderance of the evidence is and remains throughout

upon the agency. The order of presentation, however, is allocated in such a way that each party is required to give evidence in the area in which it has the better access to information. It may be that little countering evidence would be required, where, for example, the *prima facie* case was minimally supported. We need not discuss that relationship here, however, for the *prima facie* case here was more than minimally supported and Schapansky submitted no evidence effective to counter it.

The agency's burden of proof respecting strike participation may be described as a burden of "persuasion", because it has "in form the affirmative allegation" and must bear the burden of persuasion from start to finish. *See*, 9 J. Wigmore, *Wigmore on Evidence* 2486, 2489 (J. Chadbourn rev. ed. 1981).

Schapansky points to language in the Board's opinion in which it appeared to be placing a burden of persuasion on him. It is clear, however, from a reading of the challenged phrase in the context of the entire opinion that the Board in actuality placed a burden of production, not persuasion, on Schapansky following presentation of the agency's *prima facie* case. The Board specifically stated that it required the agency to "ultimately establish" the employee's participation in a strike. Thus the Board did not, as Schapansky asserts, craft some new approach for use in his case.

Absent effective rebuttal, the agency must be held to have carried its burden of persuasion. Schapansky concedes that the agency demonstrated existence of the strike and his absence during it without authorization or explanation. It is undisputed that Schapansky offered no evidence before the Board that his absence was due

to other factors. Though that state of the record would have been sufficient, the Board noted additional evidence of Schapansky's strike participation (his "yes" vote on PATCO's strike, his presence on the picket line, and his admission that, simultaneously with his fellow union members who were withholding their services, he withheld his in what he called, after the fact, "protest").

Schapansky's argument that the Board ignored the intent element involved in the striking charge is without merit. Before us, Schapansky says his only offense was absence and that he visited the picket line only out of curiosity. The argument ignores the circumstances which give meaning to his conduct. The Board specifically noted that an intent to strike can be proved by circumstantial evidence. Circumstantial evidence can be more persuasive and conclusive than direct evidence. *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325 (1960). The unrebutted *prima facie* case here constitutes such circumstantial evidence. An employee who did not intend to strike could, under the present circumstances, be expected to advise his employer of the true reasons for his absence at the earliest possible moment. If extraordinary circumstances (not here shown) prevented communication with his employer until the employee was mistakenly charged with strike participation, the employee could certainly be expected to explain his absence when (at the very latest) he responded to the agency's proposal to remove him. Schapansky's intent to withhold his services in concert with others is established on this record.

Schapansky is equally incorrect in asserting that proof of the charge requires proof of an employee's spe-

cific intent to implement an agreed plan. Neither participation in strike planning nor express agreement with others to perpetrate the strike is a necessary ingredient of proof that a particular employee participated in a strike. If a requirement for proof of intent resides in 5 U.S.C. § 7311, (and we need not and do not decide that question here) proof of general intent sacrifices. Unexplained absence during a strike of general knowledge establishes that the employee "intended" to strike. The law, like life, recognizes that one may not eat his cake (strike for benefits) and have it too (escape removal when the strike fails by merely denying intent).

In *Moylan v. Department of Transportation*, No. 83-1150, also decided today, the *amicus curiae* argues that the Board's theory of proof announced in the present case denied the controllers due process because it retroactively subjected them to a more onerous burden of proof than the Board previously had applied. The amicus' argument is that the Board's prior standard required proof of active involvement in the strike, such as picketing, to establish a *prima facie* case of striking, and that in Schapansky's case the Board eliminated that additional element of proof.

The *amicus'* argument rests upon an erroneous assumption. There was no earlier rule requiring proof of active involvement in the strike to establish strike participation. Although earlier cases in which strike participation was found involved picketing and other active strike involvement, the Board never held that such activities were an essential element of the proof of strike participation. The Board's decision in the present case did not change the standard of proof necessary to show

strike participation, but merely clarified it. Moreover, although the *amicus* in Moylan argues that the Board's allegedly new standard of proof denied the controllers a fair opportunity to present evidence under that standard, the *amicus* points to no specific evidence that the controllers would have introduced if they had known that the Board would evaluate their cases under that standard. All of the controllers had a due process opportunity before the Board to introduce evidence that they had not participated in the strike, and many took that opportunity.

The charges of absence without leave and violation of 5 U.S.C. § 7311 are supported by the same evidence found to support the charge of striking.

The Board found that the agency proved by a preponderance of the evidence the charges forming the basis for Schapansky's removal. Applying the statutory standard applicable to our review, we hold the Board's decision supported by substantial evidence and not to have been arbitrary, capricious or otherwise not in accordance with law.

(2) *The Penalty*

Sustaining the agency's determination that discharge was an appropriate penalty, the Board declined to rule on whether it had authority to mitigate it. In light of 5 U.S.C. § 7311, it held that dismissal "cannot be deemed clearly excessive or disproportionate to a sustained charge of striking".

Determination of the appropriate penalty is a matter committed primarily and largely to the discretion of the employing agency. *Jones v. United States,* 617 F.2d 233, 236 (Ct. Cl. 1980). Only in the exceptional case, in

which the penalty exceeds that permitted by statute or regulations or is so harsh that it amounts to an abuse of discretion, may its imposition be overturned. *Weston v. U. S. Department of Housing and Urban Development,* No. 83-859, slip op. at 11 (Fed. Cir. Dec. 30, 1983). Whether the court would have chosen a different penalty, had it been making the initial choice, is in the normal case irrelevant. "[P]enalty decisions are judgment calls that should be left to the discretion of the employing agency." *Weiss v. Postal Service,* 700 F.2d 754, 758 (1st Cir. 1983). The penalty here was clearly not disproportionate to the offense.

Striking against the government is a grave offense and a violation of the solemn oath an employee signs, as did Schapansky, as a condition of his employment. Striking, moreover, is a criminal offense. *See Jones, supra,* 617 F.2d at 237. It disrupts the functioning of the government itself. In this case, the inescapable and thus intentional goals of Schapansky and his striking cohorts, absent prompt governmental capitulation, were to inflict harm of the highest magnitude upon the national transportation system, to cause great public inconvenience, to injure the national economy, and to place at risk the public safety. *PATCO v. Federal Labor Relations Authority,* 685 F.2d 547, 622 (D.C. Cir., 1982) (Mackinnon, J., *concurring*). Removal under such circumstances was clearly justified, and the nexus between removal and efficiency of the service is clear.

It is argued that removal of many striking controllers actually injured the air traffic system, which was forced to rely on supervisors and new, rapidly trained controllers. The argument is inappropriate here. Wheth-

er the long range efficiency of the service is better served by capitulation, with its risk of encouraging future strikes, or by a temporary reduction in service while new controllers are trained, is solely a policy choice reserved to the executive branch.

Nothing of record supports Schapansky's assertions that the permanent removal penalty should have been mitigated and that mitigation considerations applicable to other types of charges must be applied here. Schapansky cites the length and quality of his past service. However, the gravity and effects of Schapansky's offense are so great, and the statutes relating to strikes against the United States are so unequivocal, that they do not merely limit the extent of appropriate mitigation; they render mitigation irrelevant. Congress has determined that removal is an appropriate penalty for striking against the government. It is therefore not necessary, as *amici* contend, to remand for a more complete record respecting mitigation factors. An individual with the longest and finest record may be removed when found to have irrevocably sullied that record by participating in the strike at bar against the United States. Long and excellent service creates no license to violate a criminal statute against striking, and to violate one's oath taken on the day of employment that one would not strike. Congress cannot be held to have acted unconstitutionally in enabling the United States to refrain from continuing to employ one who strikes against the federal government; nor can that enablement be impeded by mitigating factors that may be applicable to lesser offenses and different circumstances.

Lastly with respect to the penalty, Schapansky has not shown that his removal should be considered in light of the government's failure to remove those who returned to work during the Presidential grace period or "moratorium." Unevenness in application of a penalty is not a ground for invalidating it, *Jones v. U. S., supra,* 617 F.2d at 238, *Butz v. Glover Livestock Commission Co.,* 411 U.S. 182, 187, 188 (1973). Moreover, the argument relating to returnees does not involve unevenness. Those who returned occupy a status entirely different from that of those who did not. Schapansky could have availed himself of the opportunity (as 1,200 air controllers did), but chose not to do so. The President having established a grace period, no reason exists for considering those who elected to accept the presidential invitation as though they were in the same category with those who disdained it.

Similarly, also, *amici's* reliance on the allegedly less harsh response of the government to earlier and different controller actions (a call-in-sick and a slowdown) which *amici* say the agency considered to have been strikes, is irrelevant. That other government workers have struck and been allowed to return to work, *see Miller v. Bond,* 641 F.2d 997 (D.C. Cir. 1981) and *Benson v. Don,* 520 F. Supp. 231 (W.D. Pa. 1981), or that a court may have viewed it permissible under some circumstances to continue government strikers in employment, *see U.S. v. Patco,* 653 F.2d 1134 (7th Cir.) *cert. denied,* 454 U.S. 1083 (1981), cannot be viewed as forever binding the government against the removal of any striker under any circumstances. Whether removal is mandatory under 5 U.S.C. § 7311 or 18 U.S.C. § 1918 need not

be here decided. Removal is permissible under those statutes and no statute prohibits removal of any who strike against the United States. Beyond differing circumstances surrounding earlier events, nothing in the law requires that its enforcement with less than full vigor in the face of one violation of the law binds the government against full and fair enforcement in the face of a later and distinct violation of that law. Ideal justice, and government personnel regulations, envisage equal treatment of persons similarly situated. Whether those involved in earlier events were similarly situated is not here determinable. What is clear is that mercy and compassion, if such were shown in response to earlier and differing infractions, should not be forged into handcuffs restricting the government's response to the present strike of air controllers in 1981.

Similarly, *amici's* strong assertion that the Board disregarded here its own approach to determination of the appropriateness of a penalty, *see Douglas v. Veterans Administration*, 5 MSPB 313 (1981) and *Woody v. General Services Administration*, MSPB Docket No. SF07528110028 (June 2, 1981) is unsupported in the record. That the penalty includes a barrier to reemployment as a controller is not unreasonable in view of the statute, 5 U.S.C. § 7311 ("may not accept or hold a position"), and does not require Schapansky's reinstatement as a controller.

We hold that the penalty here was not arbitrary, capricious, or otherwise not in accordance with law.

(3) *Procedures*

Schapansky says that because his unauthorized and unexplained absence during the strike did not constitute

a "reasonable cause to believe" he had committed a crime, his discharge with less than thirty days notice was procedurally defective.

Section 7513(b) makes the normal 30 days' notice unnecessary when the agency has "reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed." As above indicated, 18 U.S.C. § 1918 makes participation in a strike against the government such a crime. Schapansky's unexplained absence during a well known strike established reasonable basis for the agency to believe that he was engaged in such participation and thereby automatically established a reasonable basis for its belief that he had committed the crime of striking against the government. That a second charge, absence without leave, does not relate to a crime is irrelevant. An agency is not required to wait 30 days to respond to an employee's misconduct when that misconduct is reasonably believed to constitute a crime.

Though Schapansky complains of the lack of 30-day notice, he makes no attempt to demonstrate that the shortened time of notice was harmful. The Civil Service Reform Act specifies that only harmful procedural errors may vitiate an agency action. 5 U.S.C. § 7701(c)(2)(A) (Supp. II 1978). To be harmful the error must substantially impair the employee's rights. *Shaw v. Postal Service,* 697 F.2d 1078 (Fed. Cir. 1983); *Brewer v. United States Postal Service,* 647 F.2d 1093 (Ct. Cl. 1981), *cert. denied,* 454 U.S. 1144 (1982). Nothing of record would indicate that if the shortened time of notice were error (and as above indicated it was not), it impaired Schapansky's rights in any manner.

Schapansky argues that the President's August 3, 1981 announcement was a final decision to discharge him and that the agency's removal proposal did not afford him a meaningful opportunity to reply. *Amici* argue that Schapansky should have been given the right to reply to the President and to demand that the President state his reasons for his action. The argument is without merit.

The President's announcement said those who returned would retain, and those who continued to strike would forfeit, their positions. Some 1200 controllers returned. Having elected to continue on strike, Schapansky could hardly have been surprised when the promised removal notice arrived. There was, contrary to Schapansky's argument, no discharge of Schapansky or of anyone else on August 3, 1981. After August 5, 1981, the agency carefully gave Schapansky all possible opportunities to reply under an entire panoply of rules, procedures, and regulations. Indeed, Schapansky filed three written responses and responded orally. Nothing whatever of record supports Schapansky's implication that he would not have been retained if he had shown a basis for his absence other than participation in the strike.

The President in no manner usurped the authority and responsibility of agency officials to determine whether each individual had continued to engage in the strike after the August 5, 1981 deadline. In view of the need to continue a safe air transportation system for the public, the President's dispensation was, as has been well described, a "grace" period that "worked" insofar as it enabled 1200 controllers to return promptly to maintenance of that system. One who commits a crime by striking against the government can be seen to have done

so from the first moment he withholds his services in concert with others. Schapansky, along with all other striking air controllers, was in this case given a chance to rethink for two days and thereafter was given a full and complete due process opportunity to show that he had not in fact struck against the United States. The President bears a constitutional duty to "take care that the laws be faithfully executed," U.S. Const., Art. II, §3, cl. 4. His action here was directly within his official responsibility, not merely within its "outer perimeter" as was found permissible in *Harlow v. Fitzgerald,* 457 U. S. 800 (1982). The President acted here in a manner obviously calculated to balance the public interest in a continuation of air transportation, immediate enforcement of the law, and an opportunity for violators to reconsider. An argument that the President's grace period somehow denied due process comes with poor grace from one who ignored it.

Schapansky cites decisions in contempt actions against PATCO and individuals for noncompliance with court orders to return to work: *In re: Professional Air Traffic Controllers Organization, Air Transport Association of America v. Professional Air Traffic Controllers Organization,* 699 F.2d 539 (D.C. Cir. 1983); *PATCO v. Federal Labor Relations Authority,* 685 F.2d 547 (D. C. Cir. 1982); *United States v. Phillips,* 525 F. Supp. 1, 8 n. 6 (N.D. Ill. 1981); *United States v. PATCO,* 525 F. Supp. 820, 822 (E.D. Mich. 1981); *United States v. Haggerty,* 528 F. Supp. 1286, 1296 (D. Colo. 1981) and language in opinions accompanying those decisions indicating that return to work was not possible after failure to meet the President's deadline. The citations are irrelevant here.

That Schapansky lacked after his deadline a unilateral authority to simply return to work at will, and could not therefore be held in contempt of a return to work order, bears no relation to whether the procedures applied to his removal were proper. That those procedures were guided from agency headquarters, and spelled out that controllers would be removed *if* it were *proven* that they participated in the strike, speaks for, not against, an exercise of care for employee rights under difficult and unusual circumstances.

Amici assert that the agency's procedures giving Schapansky an opportunity to explain his absence were a "sham" because the agency was "forced" by the President's announcement to fire him. At the same time, *amici* complain that there was disparate treatment because some controllers, having apparently made adequate explanations (described by *Amici as* "settlements"), were not discharged. *Amici* further say: the President's moratorium was an improper exercise of his power to pardon (U. S. Constitution, art. II, § 2 cl. 2); the agency had no power to extend the President's return to work deadline to the first scheduled shift following that deadline; and that the agency failed to notify Schapansky that he would not be removed if he met his next scheduled shift. All of those arguments have been fully considered and found without merit. Lastly, *amici's* assertions concerning the suffering of controllers' families invoke our sympathy; they cannot under the law invoke a reversal.

There is no basis whatever for Schapansky's claim that it was improper for the government to adopt a uniform policy of removing each employee whose participation in the illegal strike was proven, or that that policy

denied Schapansky a full and meaningful opportunity to reply. Schapansky has not in the slightest demonstrated that any agency officials were unreceptive to evidence that the facts supporting the charge were not as alleged, and, as above indicated, mitigation is not an issue. The Court of Claims has rejected the argument that an agency's predetermination to remove an employee if the charges against him were proven is improper. *Pascal v. United States,* 543 F.2d 1284, 1289 (Ct. Cl. 1976). The court there noted that the "crucial point is that the plaintiff has failed to demonstrate that the [agency] would have been impervious if the proof failed to show that the facts were as charged." *Id.*

We hold that the agency's procedures were in accordance with law and that their application involved no harmful error.

DECISION

Accordingly, the Board's decision sustaining the August 26, 1981 permanent removal of Schapansky by the agency from his position as Air Traffic Control Specialist at the Air Route Traffic Control Center in Fort Worth, Texas, is affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-1155

RICHARD T. ADAMS, et al.,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 83-1156

GARY S. BARACCO,*

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

DECIDED: May 18, 1984

Before MARKEY, *Chief Judge,* FRIEDMAN, RICH, SMITH and NIES, *Circuit Judges.*

MARKEY, *Chief Judge.*

Appeals from decisions of the Merit Systems Protection Board (Board), Docket Numbers NY 075281F0424, DC 075281F0895, sustaining the August 1981 removal of

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*Under Rule 43, Federal Rule of Appellate Procedure, Marjorie F. Baracco, surviving spouse and personal representative of petitioner Gary S. Baracco (deceased), was substituted as a party on motion.

Richard T. Adams, Gary Baracco, and others (Adams) by the Department of Transportation's Federal Aviation Administration (agency) from their positions as Air Traffic Control Specialists. The bases for removal constituted proven charges of striking against the United States and absence without leave. We *affirm.*

Background

The reader of this opinion is referred to this court's opinion accompanying its decision in *Schapansky v. Department of Transportation, FAA,* No. 83-663, (Fed. Cir. May 18, 1984) issued of even date. The discussion in *Schapansky* of facts and issues common to that case and this are adopted and incorporated in this opinion.

Except for instances in which a petitioner is identified by name, "Adams" should be read as applicable to all petitioners in these present appeals.[1]

Issues raised by Adams and *Amici* and differing in substance or detail from those discussed in *Schapansky* are discussed in this opinion.

Unlike Schapansky, petitioners here made no oral response to the notice of removal and were not shown to have voted for the strike. Only Baracco was shown to have engaged in picketing. Each present petitioner received an agency letter proposing removal for strike participation and absence without leave. Each responded only by submitting union (PATCO) prepared forms re-

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[1] Listed in Appendix A are petitioners whose appeals are hereby decided under Appeal No. 83-1155.

questing time enlargements and production of documents. No petitioner denied the charges.[2] No petitioner requested opportunity for oral response, beyond the requests for extension of time to answer "in writing and orally". Nor did any petitioner testify before either the agency or the Board. Other fact differences will appear in the course of discussion on the issues.

Issues

(1) Whether government officials created such confusion concerning the Presidential deadline and controller's ability to return to duty as to have prevented formation of an intent to strike.

(2) Whether the Board properly drew an adverse inference from petitioners' failure to testify.

(3) Whether the agency unlawfully suspended petitioners during agency proceedings by placing them in a non-duty, non-pay status without following the procedures of 5 U.S.C. § 7513.

(4) Whether the Board correctly found that the strike lasted at least through August 19, 1981.[3]

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[2] Adams' assertion that a sentence in one stock PATCO response (challenging any basis for a charge of committing a crime) was a denial of the charges is creative, but unavailing. The sentence was directed at the agency's use of a shortened notice period.

[3] *Amici* want the removals vacated for lack of a 30 day notice, asserting: (1) notice was sent before petitioners were found striking; and (2) 18 U.S.C. § 1918, (making strikes a crime) violates the Thirteenth Amendment. Argument (1) is unfounded. 5 U.S.C. § 7513(b) requires only a "reasonable cause to be-

(Continued on next page)

OPINION

(1) *Alleged Confusion*

Adams' brief contends that the President's announcement and agency actions respecting controllers' ability to avoid removal by returning to work were so confusing that controllers were unable to form an intent to strike. Petitioners have not told the agency, the Board, or this court what their intent was in absenting themselves from work throughout the time of the strike. Nor have they pointed to any evidence upon which anything but an intent to strike may be found, or which might counter the circumstantial evidence establishing an intent to strike.

(Continued from previous page)

lieve" an employee has committed a crime. Argument (2), impressively stated, attempts too much. Nothing in § 1918 compels anyone to work against his or her will. It neither prohibits nor impedes resignations.

Adams, Baracco, and *Amici* say the removal notice provided for reply "within 7 calendar days," thus providing effectively for 6 days, in violation of 5 U.S.C. § 7513(b) (2) (reply in "not less than 7 days"). The argument is semantic and senseless on this record. The Board held the notice itself inclusive of 7 days, though it found harmless error in a letter denying time enlargement to Baracco. Each petitioner responded to the notice within 7 days. In requesting time enlargements, petitioners said they did not think "seven days is a reasonable time". If there were error, it was harmless, no request for an oral reply time having been made within the seven day period. The burden to show harm is petitioners', 5 CFR § 1201.56(b) (1), *Shaw v. Postal Service*, 697 F.2d 1078, 1080 (Fed. Cir. 1983); yet no effort was made to show that any additional reply was or would have been attempted on the seventh day. The argument might be appropriate if the agency had refused to consider a reply filed on the seventh day because not filled "within 7 calendar days." This court does not sit, however, to decide hypotheticals.

The President announced at 11:00 a.m., E.D.T., on August 3, 1981, that controllers then striking who did not report for duty within 48 hours would forfeit their positions and "will be" terminated. Because of differences in shift schedules and time zones, the agency allowed controllers to return to work at the time of regularly-scheduled shifts that began after 11:00 a.m., on August 5, 1981.

The briefs say controllers thought they had been fired when they did not report to work before 11:00 a.m. on August 5, 1981, and thus "could not" take advantage of the permission to return at the time of their first regularly-scheduled shift following that ending of the President's grace period. The argument is disingenuous. First, the President's announcement terminated no one, least of all nonstrikers. Second, petitioners' brief do not explain why they did not, as did 1200 other controllers, report *before* 11:00 a.m. on August 5, 1981, or why they did not notify the agency at any time before their next scheduled shifts that they were not on strike, or why they did not simply report and announce their readiness to work at the time of their scheduled shifts, *if* they had no intention of striking at any of those times.

None of the present petitioners testified that he was confused. Nor is there any evidence whatever that any controller was confused.[4] Apparently recognizing the impossibility of an agency's proving what was in an employee's mind, Adams' brief concedes that intent can be

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[4] The assertion that petitioner Miller did not understand the charges is directly refuted in Miller's letter, the only evidence cited in the briefs as indicating that at least one petitioner was confused.

shown by circumstantial evidence. It makes no effort, however, to blunt the thrust of the view that a controller absent at commencement of the strike, but truly not intending to participate in it, would, promptly upon hearing or hearing of the President's announcement, contact the agency and relieve it of any presumption that his absence was in any manner related to the strike. Petitioners alone knew their true intent.

Nor is there a logical, common sense basis for believing that the President's announcement envisaged an actual, simultaneous "return to work" of 15,000 controllers, or for believing that all non-reporting controllers had been "fired" as of August 5. If any such belief existed, the notice petitioners received of a proposal to remove them and of their opportunity to reply should have disabused them of it. That one having *no* intent to strike would so cavalierly accept the loss of one's job as of August 5, or would fail to inquire, or would fail to report or return before 11:00 a.m. on August 5, 1981, or would fail to report for work at the next scheduled shift, or would fail to explain his absence at the agency proceeding or before the board, simply defies rationality.

The citations of criminal cases, in which proof must meet a beyond-a-reasonable-doubt standard and in which mere proof of absence was found consistent with resignation, *e.g., United States v. McCubbin,* Nos. 81-2059 through 2063, (10th Cir., Aug. 22, 1983); *United States v. Martinez,* 686 F.2d 334 (5th Cir. 1982), are inapt.

Petitioners' argument that the agency had a burden to notify each controller individually that he or she had until the specific time of that controller's next scheduled

shift in which to take advantage of the President's grace period is without merit. Each petitioner knew when his next regularly-scheduled shift commenced and elected not to show up at that time. Having disregarded the initial 48 hour moratorium, petitioners can hardly complain that they were not specifically and personally notified that each had an opportunity to also disregard an extension of that moratorium. There is nothing whatever of record to indicate that any petitioner would have returned or had any interest whatever in returning to work at the time of his next regularly scheduled shift. Nor is there any evidence whatever to indicate that every returning petitioner would have been turned aside. Indeed, the evidence is to the contrary.

Ad hoc speculations of lawyers cannot substitute for evidence of what actually occurred. Though the court has in the rare circumstances of these cases permitted counsel substantial leeway in argument, there must be evidence in the record somewhere in these cases to support counsel's arguments, for this court's decision must be based on a "review [of] the record". 5 U.S.C. § 7703(c).

The argument that confusion prevented formation of an intent to strike is at best unpersuasive.

(2) *The Adverse Inference*

Once the agency had presented evidence of strike participation, it was not improper to draw an adverse inference from petitioners' refusal to testify or otherwise offer rebuttal evidence before the Board.

Adams concedes the propriety of adverse inferences in civil cases when a party is silent in the face of proba-

tive adverse evidence. *See Baxter v. Pa'migiano,* 425 U.S. 308, 318-19 (1976); *Book v. Postal Service,* 675 F.2d 158 (8th Cir. 1982). The briefs say failure to deny the charges is irrelevant because the agency had not presented sufficient adverse evidence. The argument is meritless. The agency had presented before the Board a *prima facie* case of strike participation fully adequate to support the charges in the absence of countervailing rebuttal.

Attacking the presiding official's decision, Adams' brief says failure to rebut the agency's allegations was in that decision considered part of the *prima facie* case itself. Petitioners declined twice, however, to explain their absences, once during the agency removal proceedings and again during the Board hearing. The first failure to deny the charges left those absences unauthorized and unexplained, thereby adding to the sufficiency of the agency's *prima facie* case. It is the Board's decision we review, and petitioners' silence before the Board, after the agency had established a *prima facie* case, fully warranted the Board's drawing of an adverse inference. "Silence is often evidence of the most persuasive character". *United States ex rel. Bilokumsky v. Tod,* 263 U. S. 149, 153-54 (1923).

The judicial process is not entirely divorced from common sense and the everyday experiences of humankind. Petitioners had every reason and incentive to strenuously deny the charge of strike participation *if* they were not in truth strikers. But fear of prosecution for perjury, one may devoutly hope, has not entirely disappeared. The law and experience teach that a striker

can be expected to refrain from falsely testifying under oath that his absence was due to non-strike reasons.

No error occurred in the Board's drawing of an adverse inference in this case.

(3) *Suspension*

Petitioners argue that they should be given back pay because they were constructively suspended during the period between the notice proposing removal and the date of removal.

Petitioners say that *if* they had reported for duty after failing to report after their deadlines, they would not have been permitted to work. Hence, say petitioners, reporting would have been a futile act, and that failure to place them in a non-duty-with-pay status was a constructive suspension. The Board, however, correctly held as a matter of law that petitioners had to show that they were ready, willing, and able to work after their receipt of notice. No such evidence was offered by these petitioners.

When petitioners failed to report to work as scheduled, they were considered absent without leave and were not paid. Like most federal employees, petitioners were not paid for unworked time, unless that time was scheduled as paid leave. Petitioners nonetheless claim entitlement to pay during a time when, through their own volition, they were absent from work without authorization, and during which they gave the agency no reason to believe they wanted to come to work. Choosing to absent themselves, petitioners created a situation in which the agency could not pay them, and at least an ambiguity in

their pay status clarifiable only by action on their part. The view that one need not perform a knowingly futile act may be applicable to strikes in the private sector and to employer-created ambiguities. It is clearly inapplicable here. To order that petitioners be paid under the present circumstances is impermissible in view of long-standing federal pay policy and the necessity of distinguishing between those controllers who chose to report for duty between the receipt of notice and the date of removal and those controllers who, like petitioners, did not.

Petitioners, moreover, bear the burden of establishing the Board's jurisdiction, *Stern v. Department of the Army*, 699 F.2d 1312 (Fed. Cir. 1983), and their failure to establish that they were ready, willing, and able to work during the involved period constitutes a failure to carry that burden. Procedures under 5 U.S.C. § 7513 are inapplicable to "voluntary actions initiated by the employee". 5 CFR § 752.401(c)(3) (1981). *See Taylor v. United States*, 591 F.2d 688 (Ct. Cl. 1979). Non-duty status here was voluntary. It was not agency-enforced or agency-initiated disciplinary action. There was no suspension, constructive or otherwise. *See Armand v. United States*, 136 Ct. Cl. 339 (1956).

The argument based on a constructive suspension theory must fail.

(4) *The Strike Period*

Petitioner Giannattasio was not required to report for work until 11 a.m., August 12, 1981, apparently because he was on annual leave until that time. When he failed

to report, he was served with a notice of proposed removal dated August 12, 1981, charging him with striking as of that date. Giannattasio contended before the Board that the agency had not proved the strike was still in progress on August 12. The Board rejected that assertion, finding that the strike continued at least through August 19, 1981.

It has been said that the agency must prove: (1) that a strike was in progress on the date striking is charged; and (2) that the employee could have returned to work on that date. *Ketcham v. Federal Aviation Administration*, 82 FMSR¶ 7026 (May 28, 1982).

The unrebutted evidence in the present case shows conclusively that the New York Center air traffic controllers were not fired at 11 a.m. on August 5, 1981, and were not locked out at that time. Giannattasio concedes that the agency interpreted the President's August 3, 1981 announcement as permitting air traffic controllers to return to work at the time of their first assigned shift beginning atfer 11 a.m., on August 5, 1981.

There is no evidence in this record that if Giannattasio had attempted to return to work at 7 a.m. on August 12 he would not have been allowed to do so. Indeed, the evidence is to the contrary. As the Board noted, the chief of the New York Center "testified that each of the appellants would have been permitted to return to work prior to the deadline shift with which they were charged with striking." Nor is there any evidence that Giannattasio was removed before August 28, 1981, after he had received the notice of proposed termination and filed a written reply thereto.

The only remaining issue is whether substantial evidence supports the Board's findings that the strike still continued on August 12, 1981, and that Giannattasio's failure to report on that date constituted participation in the strike. There is no doubt that a strike began on August 3, 1981. That strike continued until some event ended it.

There is no evidence that the union terminated the strike before August 12, 1981. Substantial absences continued at the New York Center well into September, as did picketing with signs stating "PATCO LOCAL 201 ON STRIKE" and numerous statements by union officials that the strike of Local 201 was continuing. Neither did the government end the strike before that date by terminating the employment relationship between itself and the controllers. Although the government had begun procedures to remove the controllers by August 12, Giannattasio and many of his fellow controllers were still employees on that date.

Giannattasio relies on pronouncements and press statements of various government officials indicating that the strike ended before August 12, 1981, and on statements in court opinions indicating that the strike ended before August 19, 1981. *See United States v. Haggerty,* 528 F. Supp. 1286 (D. Col. 1981).

The government cites other authority in support of the Board's finding that the strike continued substantially beyond August 5, 1981. *See United States v. Taylor,* 693 F.2d 919 (9th Cir. 1982) (air traffic controller convicted of participating in the PATCO strike on August 8, 1981);

PATCO v. F.L.R.A., 685 F.2d 547 (D. C. Cir. 1982) (holding that strike lasted until November 1981); *United States v. PATCO*, 527 F. Supp. 1344 (N. D. Ill. 1981) (preliminary injunction on November 11, 1981, restricting place and manner of picketing by striking air traffic controllers); *PATCO v. Federal Aviation Administration*, 7 F.L.R.A. No. 10 (Nov. 3, 1981) (supplemental opinion of Chairman noting PATCO had neither disavowed nor attempted to end the strike as of November 3, 1981).

The evidence upon which Giannattasio relies does not undermine the Board's findings that the strike continued until at least August 19, 1981. However government officials may have viewed the strike, the objective facts outlined above support the Board's findings.

We hold that substantial evidence supports the Board's finding that the strike continued at the New York Center at least until August 19, 1981. Our review function thereupon ends.

Petitioners having made no attempt to rebut the foregoing evidence before the Board, Adams' brief suggests before us that the sign-carrying picketers may not have been striking controllers, but "just members of the public merely exercising their first amendment rights." The argument is imaginative but without merit in light of all the evidence.[5]

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[5] An *amicus* in appeal No. 83-1156 chastises the Board for taking "official notice" that a nationwide strike continued through August 6, 1981. The issue does not appear to have been raised before the Board in any of the "lead" cases, by way of petition for reconsideration or otherwise. Because, also, the agency proved Baracco was on strike through August

(Continued on next page)

(5) *Other Petitioners*

Listed in Appendix B to this opinion are other petitioners whose appeals were consolidated for decisional purposes before the Board in *MSPB Docket No. NY0752-81F0424* and who filed individual appeals under the numbers listed. The issues in those appeals appear to have been considered and decided in this or another of the decisions handed down by the court today. Petitioners listed in Appendix B shall notify the court within 14 days of th date of this opinion regarding their intent to withdraw or further prosecute their appeals. Absent notification within that period, the appeals listed in Appendix B will be dismissed. *See Asberry v. U. S. Postal Service,* 692 F.2d 1378, 215 USPQ 921 (Fed. Cir. 1983).

DECISION

Accordingly, the Board's decisions sustaining the removal of petitioners in Appeal Nos. 83-1155 and 83-1156 are *affirmed.*

AFFIRMED

(Continued from previous page)

7, 1981, because Baracco made no effort to refute the facts noticed, see *Ohio Bell Telephone Co. v. Public Utility Commission,* 301 U.S. 292 (1937), and because the Board did not deny petitioners their due process right to establish the nonexistence of a strike at their location or their nonparticipation as strikers, the issue is inappropriately argued here.

Appendix A

Petitioner	MSPB Docket No.	Court Docket No.
Richard T. Adams	NY075281F0424)	
	)	
Richard J. Bender	NY075281F0435)	
	)	
Richard Bronleben	NY075281F0454)	
	)	
Antonio Chevalier	NY075281F0477)	83-1155
	)	
Thomas R. Connelly	NY075281F0486)	
	)	
Thomas J. Contegni	NY075281F0488)	
	)	
Gerard Curran	NY075281F0500)	
	)	
James N. Fry	NY075281F0548)	
	)	
Allen Giannatasio	NY075281F0556)	

Appendix B

Petitioner	MSPB Docket No.	Court Docket No.
Raymond Miller	NY075281F0671	83-1159
Edward Rocks	NY075281F0748	83-1160
William Amodeo	NY075281F0430	83-1162
Robert Biancamano	NY075281F0439	83-1163

Bruce Bonacum	NY075281F0442	83-1164
John Brunner	NY075281F0457	83-1165
Richard Burns	NY075281F0460	83-1166
Kenneth Carlstrom	NY075281F0469	83-1167
William Cecil	NY075281F0473	83-1168
Charles Contegni	NY075281F0487	83-1169
Charles Darcy	NY075281F0507	83-1170
Wayne Ennis	NY075281F0531	83-1171
James Finnegan	NY075281F0538	83-1172
Gary Dawson	NY075281F0509	83-1176

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-1155

RICHARD T. ADAMS, et al.,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 83-1156

GARY S. BARACCO,*

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

NIES, *Circuit Judge,* concurring.

I join in the majority opinion and write only because I see a need for treatment of the issue of harmful error to a greater extent than it has been given in note 3 of the majority opinion.

The *Baracco* appeal is the lead case on interpretation of the harmless error provision found in 5 U.S.C. § 7701 (c)(2)(A) vis-a-vis the statutorily mandated time period for reply to the notice of proposed removal. Baracco asserts that he was given only 6 days to reply, but for reasons not discussed in the majority opinion or pertinent to other controllers.

Baracco was sent the same notice as other controllers. Thus, under the majority decision here, he was initially given a 7-day notice period. The notice was mailed August 7 by regular mail with a duplicate sent the same day by certified mail. Since Baracco did not testify, we do not know when he received the notice by regular mail which,

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*Under Rule 43, Federal Rules of Appellate Procedure, Marjorie F. Baracco, surviving spouse and personal representative of petitioner Gary S. Baracco (deceased), was substituted as a party on motion.

if before receipt of the certified mail, would have started the running of the reply period. In any event, he signed for the certified mail on August 11. In an undated letter from Baracco to the agency received August 14, he requested an extension of time to file written reply on the ground that "seven days" was not a reasonable time for filing a response. At that time he knew he had 7 days, as the MSPB found. In reply, the agency denied "an extensio nof time to submit a written reply beyond the seven day period." Had the agency letter stopped there, Baracco would have no basis for argument that he is in a different situation from others. However, in the same letter, the agency stated that the written response was to be submitted "prior to August 18, 1981, the expiration of the seven day notice period."

Treating this as arguably creating an ambiguity as to the final date for reply, the presiding official ruled that Baracco would have had to show, in any event, that a 6-day reply period was harmful error, that is, that the error might have affected the outcome of the case. Since Baracco had made a written reply within 7 days and offered no evidence at any time of individual circumstances which might have changed the outcome, the presiding official ruled that Baracco failed to show harmful error. The board agreed that Baracco was required to show that the asserted procedural error was harmful.

Baracco's position is that harmful error should not have entered into resolution of the issue of the shortened notice period. Baracco maintains that his right to a minimum 7-day reply period, unquestionably required by 5 U.S.C. § 7513(b) (2), rendered the action "not in accordance with law" within the meaning of 5 U.S.C. § 7701(c)

(2) (C), set out below, and that, therefore, reversal is required. In essence, Baracco argues that a statutory procedural requirement is not subject to the harmful error provision of 5 U.S.C. § 7701(c) (2) (A). Stated another way, violation of a statutory procedural requirement is harmful *per se*.

The statutory provisions under consideration here read in pertinent part:

> 7701(c) (2) [T]he agency's decision may not be sustained . . . if the employee . . . —
>
> (A) shows harmful error in the application of the agency's procedures in arriving at such decision.
>
> • • •
>
> (C) shows that the decision was not in accordance with law.

The MSPB carefully reviewed the statutory history of the Civil Service Reform Act of 1978, Pub. L. No. 95-45[illegible], 92 Stat. 1111 (1978) (Reform Act) to discern the relationship of these two provisions and found no clear guide to their interpretation. However, it found direction, in favor of the presiding official's ruling, in the numerous expressions of concern during hearings on the Reform Act about unnecessary procedural reversals of agency actions.[1]

In rejecting Baracco's argument, the board also found guidance in the need to give effect to all parts of the

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[1] *See Hearings Before the Senate Committee on Governmental Affairs on S. 2640, S. 2707 and S. 2830,* 95th Cong. 2d Sess. 22, 43, 101, 146 (1978); *Hearings Before the House Committee on Post Office and Civil Service on H.R. 11280,* 95th Cong., 2d Sess. 31, 122-23 (1978).

statute. The board reasoned that procedural regulations have the force of law and that, if the harmful error provision could not be applied in connection with procedures established by statute, by the same token, it could not be applied to procedures established by regulations which have the force of law. Therefore, the statutory provision on harmful error would be meaningless.

The board then reviewed and reconciled its own decisions with its holding here, and, finally, found support for its interpretation in precedent of this court, particularly, *Doyle v. Veterans Administration*, 667 F.2d 70, 72 (Ct. Cl. 1981); *Brewer v. U.S. Postal Service*, 647 F.2d 1093, 1097 (Ct. Cl. 1981), *cert. denied*, 454 U.S. 1144 (1982) and *Shaw v. U.S. Postal Service*, 697 F.2d 1078 (Fed. Cir. 1983). For example, as stated by Senior Judge Cowen in *Brewer*, the first case reviewed by the Court of Claims under the Reform Act:

> In enacting the Civil Service Reform Act of 1978, Congress declared that this court should reverse agency actions for procedural error "only if the procedures followed substantially impaired the rights of the employees." S.Rep.No. 969, 95th Cong., 2d Sess. 64, *reprinted in* [1978] U.S. Code Cong. & Ad. News 2723, 2786.

647 F.2d at 1097.

In support of the contrary position, petitioner cites cases, for example *Ryder v. United States*, 585 F.2d 482 (Ct. Cl. 1978) and *Washington v. United States*, 147 F. Supp. 284, (Ct. Cl.) *cert. denied*, 355 U.S. 801 (1957), which are clearly no longer controlling in view of the addition to the statute of the harmful error provision.

Turning again to the precise language of the statute, I conclude that paragraphs (A) and (C) are directed at

different evils. Harmful error in procedures (paragraph A) raises the question: Did the wrongful procedure harm the employee in the presentation of his defense so that a different result might have been reached? Petitioner here has not asserted such harm. He asks simply for a *per se* rule. That is not a "showing" of harm as the statute requires. Paragraph (C), on the other hand, is directed *to the decision* itself. Was the decision in its entirety in accordance with law? Since the harmful error rule is part of the law, the question becomes: Is the decision in accordance with the law including the harmful error provision? Tested against this standard, the *Baracco* decision cannot be reversed since no harmful error has been shown.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-1175

BERNARD DORRANCE,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Respondent.

DECIDED: May 18, 1984

Before MARKEY, *Chief Judge,* FRIEDMAN, RICH, SMITH, and NIES, *Circuit Judges.*

RICH, *Circuit Judge.*

This appeal is from the April 25, 1983, decision of the Merit Systems Protection Board (Board) sustaining the removal of Bernard Dorrance from his position as Air Traffic Control Specialist by the Department of Transportation's Federal Aviation Administration (agency). The bases for the removal were proven charges of striking against the United States and absence without leave. We affirm.

Background

Dorrance was employed as an air traffic controller at the New York Air Route Traffic Control Center, Ronkonkoma, New York. On August 3, 1981, the Professional Air Traffic Controllers Organization (PATCO) commenced a nation-wide strike against the agency. Dorrance failed to report for duty as scheduled at 3 p.m. on August 3, 1981. By letter of August 6, the Chief of the air traffic center notified Dorrance that he was charged with striking against the United States Government and with being absent from duty with authorization, and was apprised of his proposed dismissal. In a letter of August 10, Dorrance requested an extension of time in which to file a written response to the charges. By separate letter on that date, he also requested certain material relevant to the agency's proposed action, under the Freedom of Information Act. A third letter by Dorrance on August 13 noted that "because of ambiguities in the notice and the statutes that apply, I cannot deny or affirm the charges at this time."

The request for an extension of time was denied by letter of August 12, and, by letter of August 19, the center's Chief, Louis C. Pol, dismissed Dorrance effective

August 22, 1981. Dorrance appealed to the Board and, after a hearing, a Presiding Official sustained the agency's removal, as did the Board on petition for review in *Adams et al. v. Department of Transportation* (Docket No. NY075281F0424, April 25, 1983). Dorrance did not deny the charges against him at any stage of these proceedings, nor did he elect to testify during the hearing before the Presiding Official.

More details concerning the air traffic controllers' strike are set forth in related cases decided concurrently herewith: *Schapansky v. Department of Transportation*, No. 83-663 (Fed. Cir. May 18, 1984); and *Adams v. Department of Transportation*, 83-1155 (Fed. Cir. May 18, 1984).

Issues

Dorrance challenges the agency's removal action on several grounds, principally, (1) the agency failed to meet its burden of proof that he participated in a strike; (2) the agency erred by invoking the "crime" provision of 5 U.S.C. 7513(b) to shorten the advance notice period to Dorrance before his dismissal; (3) that his removal does not promote the efficiency of the service; and (4) that the penalty of removal is grossly disproportionate to the nature of the offense. Such issues were raised in *Schapansky*, supra, and Dorrance's appeal on these grounds is rejected for the reasons set forth in *Schapansky*.

Dorrance further contends that (5) the Presiding Official erred in drawing a negative inference from Dorrance's failure to testify in his own behalf. This argument is unavailing. Silence added to the sufficiency of the agency's case when it follows the agency's establish-

ment of a prima facie case, as discussed in our decision in *Adams*, supra.

Additional arguments by Dorrance for reversal of the Board's decision are: (6) the Presiding Official improperly relied upon hearsay evidence, i.e., the Time and Attendance Reports of the agency used to corroborate Dorrance's absence from work on August 3, 1981; (7) the harmful effect of consolidating Dorrance's case with those of 63 other air traffic controllers before the Presiding Official; (8) the harmful effect of the agency's denial of Dorrance's request of August 10 for an extension of time; (9) the violation of due process represented by alleged "dilatory" tactics of both the agency and the Presiding Official; and (10) that the agency prevented his return to work.

OPINION

Initially, we note that our standard of review for decisions of the Board is prescribed in 5 U.S.C. 7703(c).[1]

The Presiding Official heard the testimony of Chief Pol, and noted that he identified schedules, logs, and time and attendance records which documented, inter alia, the

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[1] 5 U.S.C. 7703(c) provides in pertinent part:

> (c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence; . . .

absence of Dorrance commencing on August 3, 1981. Dorrance contends that the unsupported testimony of the Center Chief is not sufficient to prove that he was striking, and that these various records are hearsay and also ineffective because of evidentiary deficiencies such as a lack of testimony as to their accuracy or the manner in which they were made and maintained.

As explained in *Schapansky*, proof of a wide-spread strike of general knowledge, together with Dorrance's absence without authorization or explanation during the strike constitutes at least a prima facie case of his participation in the strike. Dorrance neither denied his absence nor the existence of a strike; nor does he argue that he objected to Chief Pol's testimony or documents relied upon therein at the time of the hearing. The Board found that the unrebutted testimony of Chief Pol was sufficient to establish a prima facie case of striking. Furthermore, the documents appear probative and would be competent evidence though hearsay before the Board in any event. *See, e.g., Borinkhof v. Department of Justice*, 5 MSPB 150, 153 (1981); and *Brewer v. United States Postal Service*, 647 F.2d 1093, 1097-98 (Ct. Cl. 1981); *cert. den.*, 454 U.S. 1144 (1982).

Dorrance next claims that the consolidation of his case along with 63 "other appeals on one day" was harmful error, and violated his due process rights to a fair hearing.[2] Dorrance admits that the Presiding Official has

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[2] 5 U.S.C. 7701(c) (2) provides that the Board may not sustain an agency decision "if the employee . . . (a) shows harmful error in the application of the agency's procedures in arriving at such decision; . . . ."

discretion to consolidate appeals under 5 U.S.C. 7701(f); however, he contends that this consolidation "rendered the hearing a sham" and "chilled and reduced his opportunity as a matter of law, to introduce evidence in his own defense." This contention is at best disingenious because Dorrance did not object to the consolidation until now, and because he made no attempt to introduce evidence in his own defense. The consolidated appeals involved substantially the same issues and questions of fact and the same counsel represented all of the appellants. Furthermore, the one controller who did present an individual defense, Mr. Copping, was singled out for separate treatment in the Presiding Official's decision. Dorrance has not shown any harm to his opportunity to defend himself nor that this consolidation was an abuse of the Presiding Official's discretion.

The agency denied a request by Dorrance in his letter of August 10, 1981, for an extension of the time in which to respond to the charges set forth in Chief Pol's letter of August 6, 1981. This request was based on three reasons: (1) the agency improperly decreased the statutory thirty days advance notice of removal on the ground that he had committed a crime; (2) even if the crime exception is invoked, he is entitled to a reasonable time to reply and the seven days granted was not reasonable; and (3) he needed time to view materials that the agency relied upon to support its proposed removal as well as other documents requested under the Freedom of Information Act (FOICA). The first two contentions were rejected in *Schapansky* and *Adams*, supra. In its letter of August 12, the agency rejected the request for extension but addressed only part of Dorrance's third reason, noting that

the material requested under the FOIA had not been relied upon by the agency for the proposed action.

On appeal here, Dorrance argues that extension requests "should be liberally granted," and that had "he received the extension of time, he very well may have replied to the proposed dismissal." Dorrance thus contends that lack of documents and lack of response time precluded an opportunity to make a meaningful response. The Board ruled that the wording of the August 3 notice of proposed dismissal did not lack sufficient particularity as to the charges against him. We agree. *See Anderson v. Department of Transportation,* No. 83-1153 (Fed. Cir. May 18, 1984). Dorrance attributes harmful effect to this denial, but he has not shown that the agency's decision precluded a meaningful response to the charges. The mere allegation of harm is unpersuasive.

Dorrance contends that the agency engaged in dilatory tactics during the course of proceedings, including failure to meet certain deadlines and to respond to certain of his motions and requests, and that this violated his due process rights. Indeed, Dorrance moved for sanctions against the agency, but these were not granted by the Presiding Official. Dorrance contends that it was "a gross perversion of justice for, on [the] one hand to hold that petitioner could not have more than seven days to respond to the charges; but on the other hand, to essentially give respondent all the time it required. . . ." The Board held that, absent a showing that the Presiding Official had abused his discretion, his determinations will not be found to constitute reversible error. To be "harmful error" necessitating our reversal of the Board, the error must substantially impair an employee's rights.

Brewer, supra; *Shaw v. United States Postal Service,* 697 F.2d 1078 (CAFC 1983).

The Board considered the special circumstances of this strike in which approximately 11,000 related air traffic controller "appeals can and should be recognized." Notwithstanding agency delays the Board concluded that the Presiding Official's management of the case and the agency's conduct were not shown to have caused any "prejudicial harm to appellants' presentation of their cases." On appeal to this court, Dorrance has demonstrated no such harm to his rights, and we find no deprivation of due process.

Finally, Dorrance urges reversal of the Board on the ground that he was effectively "locked out" of the Air Route Traffic Control Center and prevented from returning to work. This contention is based both on an announcement by Chief Pol over the public address system on August 5, 1981, at 11 a.m., that any air traffic controllers then outside the facility who wanted to report for work would be escorted into the facility, and upon President Reagan's announcement, 48 hours earlier, that controllers who had not reported for work within 48 hours would be fired. Chief Pol testified that the gates were not locked at the time of the announcement. The Board found that, "Viewed in a light most favorable to appellants, the most that can be found from these circumstances is that anyone within hearing distance of the announcement (which appellants do not claim to have been) was specifically informed not that he or she could not return to work, but rather that he or she could."

The Board also found that it was incumbent upon the individuals removed from service to seek "any necessary

clarification" as to the actual time of the deadline for their return to work. Additionally, the Board found that any perceived futility in attempting to return to work did not relieve them from attempting to contact the facility. The Board's holding that Chief Pol's statements did not serve to "lock out" Dorrance was supported by substantial evidence.

Summary

We hold that the agency's procedures were in accordance with the law and that its actions and those of the Presiding Official involved no error. Accordingly, for reasons stated herein and in the related cases decided today, the Board's decision sustaining the August 22, 1981, permanent removal of Dorrance by the agency from his position as Air Traffic Control Specialist at the New York Air Route Traffic Control Center is *affirmed.*

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-1173

ROBERT L. CAMPBELL, et al.

Petitioners,

vs.

DEPARTMENT OF TRANSPORTATION; FEDERAL AVIATION ADMINISTRATION

Respondents.

MOTION FOR PARTIAL REMAND

COMES NOW the above named petitioners, by and through their attorneys, KARP, GOLDSTEIN & STERN, and moves this court to enter its Order remanding, in part, the instant appeal to an appropriate Administrative Law Judge to conduct evidentiary hearings, as described below, and as grounds therefore states the following.

1. Section 5, U.S.C. §1205(g) of the Civil Service Reform Act of 1978, states that the Merit Systems Protection Board (hereinafter referred to as "Board"), shall not issue advisory opinions.

2. On February 1, 1983, after having received information regarding the existence of advisory opinions, Mr. Rex B. Campbell, the former representative of the above named petitioners (hereinafter referred to as "Representative Campbell") filed a Freedom of Information Act request with the Denver Regional Office of the Board. In response to this request, Mr. Jack B. Toll, Regional Director of the Board, supplied Mr. Campbell with a number of documents that had not been previously provided during the course of the Pre-Hearing and Hearing proceedings in the instant case. The documents in question contain legal opinions regarding a number of the major issues to be adjudicated in the former air traffic controller cases. These legal opinions are preceeded by a cover memorandum which describes these documents as "Advisory Opinions from Office of General Counsel" (the Freedom of Information Act response, the cover memorandum, and the advisory opinions are attached hereto as Exhibit A). At this point in time, the undersigned has no way of knowing whether there are other documents or communications,

either written or oral, which could be described as "advisory opinions" which were not contained in the response to the aforementioned Freedom of Information Act request.

3. After receiving the above-described advisory opinions, Mr. Campbell filed a motion with the Board entitled "Violations of 5 U.S.C. §1205(g)". (This motion is attached hereto as Exhibit B).

4. At footnote 19 of its Opinion and Order in the instant case, the Board states that the above-described advisory opinions do not constitute a violation of 5 U.S.C. §1205(g). This aspect of the Board's decision contained a number of factual statements that the petitioners are unable to evaluate or contest without the granting of this Motion for Partial Remand.

5. The petitioners concede that the possibility exists that the manner in which the attached advisory opinions were created, distributed, and incorporated in specific decisions does not violate either 5 U.S.C. §1205(g), or the petitioners' right to the due process of law. It is equally possible, however, that the use of the advisory opinions does constitute such a violation (See attached Memorandum). It is clear, therefore, that this issue cannot be fairly adjudicated and resolved without affording the petitioners an opportunity to develop the record on this point. This would require taking the testimony of Presiding Official Skaggs; Jacqueline R. Bradley, Assistant Managing Director for Regional Operations who circulated the advisory opinions; Evangeline W. Swift, who authored the opinions; and, perhaps other Board employees who were involved in the decision to create and

distribute said opinions. The testimony would focus on the circumstances surrounding the creation and distribution of the advisory opinions and their affect on Presiding Official Skaggs and her interim decision in the instant case.

6. With respect to the procedure to be employed in connection with this Motion, petitioners would recommend that this court retain jurisdiction of this appeal and remand it, in part, to an Administrative Law Judge to conduct a hearing regarding the issues raised herein. It is further recommended that an Administrative Law Judge should be chosen who has had no connection to any of the former air traffic controller cases.

7. It is the petitioners' hope that the hearing pursuant to the partial remand could be held as expeditiously as possible and would *not* interfere with the briefing and oral argument schedule to be imposed by this court.

WHEREFORE, the petitioners respectfully request that this Court enter its Order remanding, in part, the above captioned appeal, to the appropriate authority for the scheduling and conducting of an evidentiary hearing on the development, distribution, and use, of the attached advisory opinions.

Respectfully submitted,

KARP, GOLDSTEIN & STERN

BY: /s/ Kenneth H. Stern
Attorney for Petitioners
1763 Franklin Street
Denver, Colorado 80218
(303) 861-8580

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the foregoing Motion for Partial Remand by placing same in the United States mail this 6th day of July, 1983, postage pre-paid and properly addressed to:

Lorraine B. Halloway
Department of Justice
Civil Division, Commercial Litigation Branch
Washington, D.C. 20520

/s/ Nancy Thienes

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-1173

ROBERT L. CAMPBELL, et al.

Petitioners,

vs.

DEPARTMENT OF TRANSPORTATION; FEDERAL AVIATION ADMINISTRATION

Respondents.

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL REMAND

COMES NOW the above named petitioners, by and through their attorneys, KARP, GOLDSTEIN & STERN, and submit the following memorandum in support of their Motion for Partial Remand:

I. BACKGROUND

In October of that year, the U.S. Congress passed the Civil Service Reform Act of 1978. The Act created

the Merit Systems Protection Board (hereinafter referred to as "Board") to assume the adjudicatory functions that had previously been handled by the United States Civil Service Commission. To a large extent, the Board:

> Emerges as an adjudicatory agency explicitly established against preceived defects in the adjudicatory functions of the Civil Service Commission.

Vaughn, The Opinions of the Merit Systems Protection Board: A Study in Administrative Adjudication, 24 AD.L.R. 25 (1980). See also *Guttman, A Development and Exercise of Appellate Powers in Adverse Action Appeals,* 19 A.M.U.L.R. 323 (1970); *General Accounting Office, Design and Administration of the Civil Service Commission's Adverse Action and Appeals Systems Need to be Improved,* B-19810 (1970); *Vaughn, The Spoiled System: a Call for Civil Service Reform* (1975). Even the legislative history reflects Congress' concern that an adjudicative body be created that is above reproach 1978 U.S. Code Cong. and Adm. News pp. 2723, 2727-2729:

> There is little doubt that a vigorous protector of the Merit System is needed. The lack of adequate protection was painfully obvious during the Civil Service abuses only a few years ago.

Id. at 2729.

In recognition of the adjudicatory shortcomings of the U.S. Civil Service Commission, Congress created, in the form of the Board, a more formal, quasi-judicial body that has been endowed with a high level of due process rights. One aspect om this new, formal adjudicatory process was the explicit prohibition against the issuance of advisory opinions. 5 U.S.C. §1205(g).

In the Act, Congress commands the Board to promulgate regulations that are consistent with the concerns and mandates contained therein. In conjunction with the publication of their final rules, the Board underscores this clear mandate from Congress. In response to a large number of comments criticizing the Board's proposed rules as being "too legalistic" the Board makes the following observation:

> Based on a careful analysis of the legislative history of the Act, it is the Board's position that Congress intended it to function it as a quasi-judicial agency and therefore it is essential that formalized procedure be implemented to process cases. This is particularly necessary given the Congressional mandate that employees receive full due process rights in the adjudication of their appeals. Accordingly, it was necessary to set forth required standards and procedures in some detail.

44 F.R. No. 127 at 3834 (June 19, 1979).

In promulgating its regulations, as mandated by statute, the Board created the office of "Presiding Official". Presiding Officials were intended to be independent hearing officers who would conduct pre-hearing and hearing proceedings, consider and make rulings regarding evidence adduced at the time of hearing, and make independent determinations regarding the law and facts to be applied in a given case. See 5 C.F.R. §§ 1201.4, 1201.41, and *Weaver v. Department of Navy,* 2 MSPB 297 (1980).

The Board, itself, has often underscored the necessity for strong, independent presiding officials. In a recent proceeding before the Federal Labor Relations Authority, the Board filed a brief opposing a move by presiding

officials and attorneys in the General Counsel's Office and the Office of Appeals to form a single bargaining unit. *MSPB* v. *MSPB Professional Association*, No. 3-0103. In the Board's brief in opposition to this move, it makes the following strong policy statement:

> While the agency recognizes that the proposed unit employees do share common general personnel policies and practices, the agency is also compelled to establish and maintain the highest standards of integrity due to its role as an adjudicating body. This principle clearly requires the agency to insulate itself from the preception of an inherent conflict of interest. *The establishment of a regional system with no review by the Board members prior to the issuance of an initial decision, was designed to institutionalize the independence of presiding officials.*

Id., MSPB Brief in Opposition (Emphasis added).

One leading commentator, in an important law review article, discusses the significance of having presiding officials conduct hearings as opposed to Administrative Law Judges. In response to the suggestion that presiding officials may be more suceptible to the abuses found in the United States Civil Service Commission, this commentator states the following:

> Too much can be made of this distinction. The Board benefits by insulating its presiding officials from intervention of the Board in pending cases other than through proper adjudicatory procedures. The sense of independence given to presiding officials protects them and enhances the reputation of the Board. The regulations of the Board limit the involvement of officials of the Board other than through review authority (Footnote omitted).

Vaughn, The Opinions of the Merit Systems Protection Board: A Study in Administrative Adjudication, supra, at p.40.

In accessing the impact of the issuauce of advisory opinions in the instant case, it is imperative to consider the administrative and legislative history leading to the creation of the Board.

II. THE EXISTENCE AND USE OF ADVISORY OPINIONS IN THE INSTANT CASE

The case of *Robert L. Campbell, et al.*, proceeded to hearing, before Presiding Official Gayle E. Skaggs, on May 19-21, 24-25, 1982. On August 7, 1982, Presiding Official Skaggs rendered her initial decision in the Campbell case.

On February 1, 1983, lay representative Rex B. Campbell filed a Freedom of Information Act request with the Denver Regional Office of the Board. In response thereto, on February 3, 1983, Representative Campbell received the cover memorandum and advisory opinions which are attached as exhibits to the Motion for Partial Remand.

In the first instance, the cover memorandum describes the attached documents as "advisory opinions from Office of General Counsel". A reading of said documents indicates that this title is not a misnomar. The Board, in its Order and Opinion in the instant case, attempted to circumvent the prohibition contained in 5 U.S.C. §1205(g) by stating that the opinions case from the Office of the General Counsel. This distinction is a matter of form over substance in that the Office of General Counsel was created by and is part of the staff of the Board. See 5 CFR 1200, *et seq.* The Office of General Counsel is not an independent agency but rather is an arm of the Board.

The cover memorandum does contain a proviso that "presiding officials are not *obligated* to adopt the analysis and conclusions contained in the opinion" (See Exhibit A, of the Motion, emphasis added). One would have to question the motivation for putting such a disclaimer in the cover memorandum. Perhaps there was a concern that the document would be made public and that a great deal of controversy would flow from such a disclosure. Such an interpretation is given support by the admonition that "this opinion should not be placed in the record of any appeal" (See Exhibit A).

A comparison between the advisory opinions and the decision in the instant case, as well as others, clearly reflects the fact that the advisory opinions did influence and were incorporated into the decisions of presiding officials. Specifically, at a number of pertinent points, the decision of Presiding Official Skaggs in this case is taken almost verbatim from the advisory opinions. For example, see pages 52-56 of Skaggs' Interim Decision as compared with the advisory opinion dated April 21, 1982, dealing with the proper penalty to be employed. See also pages 48-49 of the same initial decision as compared with the advisory opinion dated April 29, 1982 at page 5 with respect to the Constitutionality of §7311.

Decisions by other presiding officials in the Denver Regional confirm the impact of the advisory opinions issued by the Board. Attached hereto as Exhibit A is a copy of the interim decision in the case of *Janet L. Apple, et al*, Case #DE075281F0653. The interim decision, issued by Presiding Official Stephen L. Chaffin, also borrows liberally from the advisory opinions. For example, compare Apple's initial decision pages 16-19 with April

21, 1982, advisory opinion regarding penalties. Also compare initial decision pages 37-38 with advisory opinion dated April 29, 1982, regarding the constitutionality of §7311.

The purpose of the discussion above is to establish a prima facia case that the advisory opinions did affect presiding officials generally and the outcome of the instant case. A stronger, more comprehensive record can only be established through an evidentiary hearing pursuant to the petitioners' Motion for a Partial Remand.

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III. CONCLUSION

The arguments and documents contained in and attached to the instant motion and memorandum clearly demonstrates that advisory opinions were issued and did have an impact on the interim decision rendered in *Robert L. Campbell, et al.* The nature and degree of this impact, as well as its legality, can only be resolved if the case is partially remanded pursuant to the petitioners' motion.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the foregoing Motion in Support of Motion for Partial Remand by placing same in the United States mail this 6th day of July, 1983, postage pre-paid and properly addressed to:

Lorraine B. Halloway
Department of Justice
Civil Division, Commercial
Litigation Branch
Washington, D.C. 20530
/s/ Nancy Thienes